

Tax Alert

May 2023

Highlights of the Finance Bill 2023



CONTENTS

	Page
INTRODUCTION	3
INCOME TAX ACT	4
TAX APPEALS TRIBUNAL ACT, 2013	14
TAX PROCEDURES ACT, 2015	15
VALUE ADDED TAX ACT, 2013	18
EXCISE DUTY ACT, 2015	23
MISCELLANEOUS FEES AND LEVIES ACT, 2016	26
OTHER MISCELLANEOUS AMENDMENTS	29



General comments on the proposed changes

The Finance Bill, 2023 ("the Bill") was published on 28th April 2023 and has already been referred to the Departmental Committee on Finance and Planning of the National Assembly for consideration and reporting to the House. The National Assembly has invited the public and relevant stakeholders to submit their comments on the Bill by 20th May 2023.

The Bill proposes significant and radical amendments to various tax statutes with far reaching implications. For example, the Bill proposes to introduce a PAYE super tax band of 35%, introduce new tax on digital assets and require the daily remittance of certain taxes. Further, the Bill proposes to reverse applicability of VAT on exported services which was introduced through the Finance Act, 2022.

Noteworthy, the Bill also contains some drafting errors such as on the taxation of petroleum products. Whilst the drafting of the Bill seems inclined to reclassify the VAT status on petroleum products to the exempt category, it would appear that the intention of the amendment is to standard rate these products at 16%.

This Tax Alert analyses the various proposals contained in the Bill for your information and to enable you submit your comments to the National Assembly for consideration.

The Customs changes will be communicated later through the East African Gazette Notice that is expected to be published by 30th June 2023.

Please note that the proposals contained in this Bill will not become effective until enacted into an Act of Parliament, as expected on or before the 30th June 2023. At the moment, the proposals remain ineffective.



INCOME TAX ACT

Tax treatment of realized foreign exchange losses

The Bill proposes to amend Section 4A of the ITA to provide that realised foreign exchange losses will only be deferred by a company whose gross interest paid or payable to a non-resident person exceeds 30% of the company's Earnings Before Interest, Taxes, Depreciation and Amortization ("EBITDA") in any year of income. The Bill also proposes that the deferred foreign exchange losses shall be claimed over a period of three years from the date the losses was realized.

The proposal as worded is ambiguous as it is not outrightly clear if the three year period for claiming the deferred losses is irrespective of whether the company ceases to offend the EBITDA test as a condition for the losses to be claimed back. It is also not clear if the losses are to be spread equally in the three years.

Proposed effective date: 01 July 2023

Expansion of taxable employment benefits

The Bill proposes that the tax free benefit in relation to amounts received as mileage claim by employees on official duties shall be the approved rates by the Automobile Association of Kenya ("AA Kenya"). Any amounts above the approved rates shall be taxable benefits on the employee. This is a welcome move as it seeks to provide clarity on the uniform rates to be applied for mileage claim.

Further, the Bill has clarified that club entrance and subscription fees paid by the employer and have been disallowed on the employer to be a taxable benefit on the employee. The proposal as worded would result in taxation of club entrance and subscription fees on both the employer and employee.

Proposed effective date: 01 July 2023

Tax free employment benefits

The Bill proposes to exclude from taxable employment gains any amount paid or granted to a public officer to reimburse an expenditure incurred for the purpose of performing official duties, notwithstanding the ownership or control of any assets purchased.

The proposal is discriminative as it seeks to exempt public officers on any amounts paid to them as per diem while other employees in the private sector are taxed on any per diem amounts in excess of KShs 2,000 per day, if the excess amount is not supported. This is a disingenuous way of hoodwinking the National Assembly to pass this proposal since they are major beneficiaries of per diems. In the unlikely event that this proposal is enacted into law, there is a likelihood it will be challenged in Court, as it flagrantly seeks to discriminate on anyone who is not a public officer.

Proposed effective date: 01 July 2023

Clarification on taxation of Employee Share Ownership Plans (ESOPs)

Currently, the ITA provides that the value of the benefit in relation to employee share ownership plans shall be the difference between the offer price at the date the option is granted and the market value on the date the employee exercises the option. The definition of market value, however, contradicts this by providing that the market value is the date the shares were granted by the employer.



The Bill proposes to correct this anomaly by amending the definition of the market value to be the mid-market value on the date the option is exercised by the employee in case of shares fully listed on any securities exchange operating in Kenya. Where the shares are not fully listed, the market value shall be the price which the shares might reasonably be expected to fetch on sale in the open market when the option is exercised.

Proposed effective date: 01 January 2024

Incentivising ESOPs for Start-ups

The Bill proposes to introduce a preferential tax regime on ESOPs for start-ups. The Bill proposes to tax employees' benefits derived from allocation of company's shares in lieu of cash emoluments by an eligible start-up. The tax on the benefit shall, however, be deferred and taxed within thirty days of the earlier of:

- a. the expiry of five years from the end of the year of the award of the shares;
- b. the disposal of the shares by the employee; or
- c. the date the employee ceases to be an employee of the eligible start-up.

Additionally, the Bill proposes the benefit will not apply to any cash emoluments or other benefits in kind offered to an employee by virtue of employment. Further, the value of the taxable benefit will be the fair market value of the shares and where the fair market value is not available, the Commissioner will determine the value of the shares based on the last issued financial statements.

For the avoidance of doubt, the Bill defines an eligible start-up company to mean a business incorporated in Kenya with an annual turnover of not more than one hundred million shillings, does not carry on management, professional or training business, has not been formed as a result of splitting or restructuring of an existing entity and has been in existence for a period of not more than five years.

The proposed change reflects the Government's intention to promote start-ups and encourage staff incentives schemes even for small entities. ESOPs are traditionally associated with large successful companies and they have not been very popular in Kenya. This proposal is a big win for the bottom up philosophy.

Proposed effective date: 01 July 2023

Introduction of Branch Repatriation Tax

The Bill proposes to introduce a Branch Repatriation Tax which will be computed on the repatriated income earned in Kenya and sent to the Head Office for the year of income. The Branch Repatriation Tax will be considered a dividend distribution by the Branch to the Head Office and will be in addition to the tax charged on income of the Branch. The Bill further provides the formula to be used by the Branch in the computation of the Branch Repatriation Tax. The formula seeks to charge to tax the change in net assets in the year of income and the difference between the net profit for the year of income and the tax payable by the Branch.

Additionally, the Bill provides that the net assets for purposes of determining repatriated income will be the total book value of assets less total liabilities for the year of income excluding the revaluation of assets, while the net profit will be calculated in accordance with generally accepted accounting principles.

The proposal intends to widen the tax bracket by bringing to tax any repatriations by the branch to the head office which were hitherto not subject to tax.

Proposed effective date: 01 January 2024

Reduction of the Income Tax Rate for Branches and other Permanent Establishments

The Bill proposes to lower the tax rate levied on Branches and other Permanent Establishments (PEs) operating in Kenya from the current rate of 37.5% to 30% on their taxable gains.

Though the proposal may seem as an incentive to Branch offices of non-resident persons operating in Kenya and other PEs, the Bill also proposes to introduce a Branch Repatriation Tax, which is akin to the government giving with one hand and taking with the other.

Proposed effective date: 01 January 2024

Non-deductibility of Withholding Tax paid to non-resident persons on amounts disallowed in an audit

The Bill proposes that in the event an audit adjustment is made by the Kenya Revenue Authority (KRA) in relation to payments made to a non-resident person and withholding tax (WHT) has already been deducted and paid, the WHT shall not be refundable or available for deduction against the tax resulting from the audit adjustment.

This proposal is a retrogressive provision as it amounts to the government having its cake and eating it in relation to the audit adjustment.

Proposed effective date: 01 July 2023

Repeal of Tax exemptions on Trust Income

The Finance Act, 2021 introduced tax exemptions on amounts paid by a registered trust to a beneficiary, where the amount is less than KShs 10 million and is used exclusively for the purpose of education, medical treatment or early adulthood housing or any amount as the Commissioner may prescribe.

The Bill proposes to repeal the above exemption and therefore, any payments from a registered trust to the beneficiaries will be taxable.

Proposed effective date: 01 July 2023

Revision of Turnover Tax Threshold

The Bill proposes to narrow the threshold of persons eligible for Turnover Tax (ToT) from the current annual turnover of between KShs 1 Million and KShs 50 Million to an annual turnover of between KShs 500,000 and KShs 15 million. ToT offers a simplified tax regime for small and medium businesses but has previously failed to achieve the intended purpose of easing administration of tax for businesses in the informal sector which has largely remained untaxed due to its amorphous nature. Further, the Bill proposes to increase the ToT rate from the current 1% to 3% of turnover.

The proposal is a double-edged sword because, whilst it reduces the lower threshold for ToT eligibility, the capping of the upper bracket at KShs 15 million annual turnover will mean that businesses with a turnover above this upper bracket will automatically graduate to the 30% corporation tax rate regime.

Proposed effective date: 01 July 2023

Introduction of Digital Asset Tax

The Bill proposes to introduce a new tax to be known as Digital Asset Tax ("DAT"), which will be payable by a person on the income derived from the transfer or exchange of digital assets. The tax will be at the rate of 3% of the transfer or exchange value of the digital asset.

A digital asset will be anything of value that is not tangible and cryptocurrencies, token code, number held in digital form and generated through cryptographic means or otherwise, by whatever name called, providing a digital representation of value exchanged with or without consideration that can be transferred, stored or exchanged electronically and a non-fungible token or any other token of similar nature.

The income derived from the transfer or exchange of a digital asset will be the gross fair market value consideration received or receivable at the point of exchange or transfer of a digital asset.

DAT will be deducted and remitted to the Commissioner by the owner of the platform or the person who facilitates the exchange or transfer of a digital asset. The tax will be remitted within 24 hours together with a return of the amount of the payment, the amount of tax deducted, and such other information as the Commissioner may require.

The Bill further provides that if the platform over which the digital asset is transferred or exchanged is owned by a non-resident person, the non-resident person will be required to register under the simplified tax regime to remit the DAT derived.

This proposal is targeted at netting additional tax revenues through widening of the tax bracket to capture new forms of digital transactions whose income is derived from or accrued in Kenya.

Proposed effective date: 01 September 2023

Finally, clarity on Diminution Rate

The Bill proposes to provide that the allowable deduction in relation to diminution in value of any implement, utensil or similar article employed in the production of gains or profits will be at the rate of one hundred per cent in that year of income.

This is a welcome proposal as it finally clarifies on the rate to be used in respect of diminution.

Proposed effective date: 01 July 2023

Expansion of interest subject to owner occupied interest deduction

The Bill proposes to include any interest paid to mortgage refinance companies licensed under the Central Bank of Kenya to qualify for owner occupied interest deduction. Tax resident persons are allowed to deduct interest paid up to a maximum of KShs 300,000 on an amount borrowed from a specified financial institution to purchase or improve the premises occupied by the person for residential purposes.

The proposal is aimed at encouraging resident persons to take up mortgage facilities provided by the Kenya Mortgage Refinance Company through providing for the tax deductibility of interest payments.

Proposed effective date: 01 July 2023

Wife's employment income no longer a separate source of income

The Bill proposes that a wife's employment income, profession gains or profit will not be accounted as a separate source of income by the husband. Consequently, the wife will be required to account for her employment income, profession gains or profit separately.

This is a long overdue proposal as wives account for and file their taxes separately.

Proposed effective date: 01 July 2023

Non-deductibility of invoices not generated through Electronic Tax Invoice Management System

The Bill proposes to disallow for income tax purposes any expenditure or loss where invoices from the transaction are not generated from an electronic tax invoice management system (E-TIMS). The only exemption to this shall be in relation to expenditure on emoluments, imports, investment allowances, interest and similar payments.

The proposal demonstrates the Government's intention to on-board all taxpayers onto the E-TIMS platform. The proposed effective date may, however, not be practical to implement as the E-TIMS implementation is still in its pilot stage.

Proposed effective date: 01 January 2024

Clean-up on interest restriction provision

The Interest restriction provision was introduced through the Finance Act, 2021 effective from 1st January 2022. This provision requires restriction of the gross interest paid or payable to related persons and third parties in excess of 30% of EBITDA. The restriction of interest paid or payable to resident persons has been of concern to taxpayers as the full interest income is declared by the recipient and taxed accordingly.

In a bid to alleviate the concern, the Bill proposes to provide that the only interest to be restricted is in respect of loans received from non-residents in excess of 30% of EBITDA. The loans from non-residents could either be from related persons or third parties.

The Bill further provides that the restricted interest will be an allowable deduction in the subsequent 3 years of income to the extent that the deduction does not exceed the 30% EBITDA threshold.

The exclusion of loans from resident persons is a welcome move to the extent that the interest income is declared and subject to tax by the recipient in Kenya. This proposed amendment prevents excessive interest charged by non-residents to Kenyan persons, which we believe was the original intent of the provision with effect from 1st January 2022.

However, the proposal for taxpayers to be allowed to claim the restricted interest in the subsequent three years creates ambiguity on how this will be computed bearing in mind that the provisions of Section 16(2)(j) are purely on restriction of excess interest expense. Will taxpayers be required to proportionately claim the restricted interest in the next three subsequent years or will they reserve the option to claim all the restricted interest in one or more of the subsequent years? How will the allowability of the restricted interest expense affect the subsequent years' interest expenses when it comes to evaluating if the 30% gross interest expense as a percentage of EBITDA has been exceeded?

Proposed effective date: 01 January 2024

Exclusion of entities from the exemption of interest restriction provision

The ITA exempted some entities from this provision when it was introduced. The Bill proposes to exclude from this exemption companies engaged in manufacturing and whose cumulative investment in the preceding five years from the commencement of this provision was at least five billion shillings. Also excluded are companies engaged in manufacturing and whose cumulative investment is at least 5 billion shillings and which are located outside Nairobi City County and Mombasa County.

These exemptions were introduced through the Finance Act, 2022 and the Bill proposes to reverse them.

Proposed effective date: 01 January 2024

Tax deductibility of the expenditure of non-resident persons

The ITA provides that for a non-resident person operating in Kenya, no deduction for tax purposes is allowed in respect of any expenditure incurred outside Kenya by the non-resident person, other than expenditure in respect of which the Commissioner determines that adequate consideration has been given. Further, the ITA provides that no deduction is allowed in respect of fees paid to non-resident directors and expenses related to executive and general administration in a year of income.

The Bill proposes to repeal the above provision and therefore the tax deductibility of the above expenditure will be evaluated in line with the provisions of Section 15 and 16 of the ITA.

Proposed effective date: 01 July 2023

Taxation of qualifying Intellectual Property income in preferential tax regimes

The Bill proposes to introduce a preferential tax rate on qualifying intellectual property income. The Bill further proposes a formula for computing the qualifying intellectual property income.

However, salient information on what constitutes intellectual property income and the modalities of levying the preferential tax are missing from the Bill making it difficult to comprehend the intended tax objective of this proposal. Further, Section 18A(3) which the Bill makes reference to does not exist which may be an inadvertent error on the drafters of the Bill.

Proposed effective date: 01 January 2024

Clarifications on Country by Country reporting requirements for Multinational Enterprises

The Bill proposes to clarify that the obligation to file a country-by-country ("CbC") report shall be bestowed on an Ultimate Parent Entity ("UPE") that is tax resident in Kenya and where the consolidated group turnover of the multinational enterprise (MNE) group exceeds KShs 95 billion in the preceding year.

Further, the Bill proposes that a constituent entity of a MNE group that is resident in Kenya, and which is part of a MNE group whose consolidated group turnover exceeds KShs 95 billion in the preceding year should file CbC report with the Commissioner in the instance where:

- a. the UPE is not obligated to file a CbC report in its jurisdiction of tax residence;
- b. the jurisdiction in which the UPE is resident has a current international tax agreement which Kenya is a party to but does not have a competent authority agreement with Kenya at the time of filing the CbC report for the reporting financial year; or
- c. there has been a systemic failure of the jurisdiction of tax residence of the UPE that has been notified by the Commissioner to the constituent entity resident in Kenya.

The time frame for filing the CbC report remains to be by the last day of the 12th month after the financial year of the group.

The above proposals provide much needed clarity in relation to the obligation to file CbC reports with the Commissioner.

Proposed effective date: 01 July 2023

Taxation of Membership Clubs and Trade Associations

The Bill proposes to bring to tax the gross receipts on revenue for membership clubs and trade associations other than joining fees, welfare contributions and subscriptions. Currently, the ITA exempts taxation of membership clubs from income tax provided that more than 75% of such gross receipts, other than gross investment receipts from the members of such clubs. Trade Associations, on the other hand, elect by notice in writing to the Commissioner in respect of any year income to be deemed to carry on business chargeable to tax.

The proposal seeks to provide clarity and align the taxation of both membership clubs and trade associations. Additionally, this will widen the tax net by ensuring all membership clubs and trade associations subject to Income Tax all gross receipts on revenue, other than joining fees, welfare contributions and subscriptions.

Proposed effective date: 01 July 2023

Introduction of Post-retirement medical fund relief

The Bill proposes to introduce a post-retirement medical fund relief at the lower of 15% of the amount contributed or KShs 60,000 per annum.

This is a welcome move as this will encourage individuals to contribute to the post-retirement medical fund through offering them a relief on the amounts contributed.

Proposed effective date: 01 January 2024

Payments to residents for sales promotion, marketing and advertising services to be subject to WHT

The Bill proposes to introduce WHT on payments made to resident persons in respect of sales promotion, marketing and advertising services. Currently, WHT is only applicable to sales promotion, marketing and advertising services paid to non-residents at the non-resident rate of 20%.

The proposed WHT will be at the rate of 5% on payments to residents where the aggregate amount exceeds KShs 24,000 in a month and will be payable within 24 hours after deduction.

The proposal seeks to widen the scope of payments subject to WHT. Taxpayers will be required to remit the WHT almost immediately unlike the current provisions where the WHT has to be paid to KRA at least by the 20th of the following month.

Introduction of WHT on Payments to digital content creators

The Bill seeks to introduce WHT on payments to resident persons in relation to digital content monetisation. Digital content monetisation refers to offering for payment entertainment, social, literal, artistic, educational or any other material electronically through any medium or channel, in any of the following forms:

- i. advertisement on websites, social media platforms or similar networks by partnering with brands including endorsements from sellers of such brands;
- ii. sponsorship where a brand owner pays a content creator for content creation and promotion;
- iii. affiliate marketing where the content creator earns a commission whenever the audience of the content creator clicks on the product displayed;
- iv. subscription services where the audience pays a periodic fee to access the content and support the content creator;

- v. merchandise sales where physical goods and services are sold featuring a logo, brand or catchphrase to the audience of the content creator, eBooks, courses, or software;
- vi. membership programmes for exclusive content including early access;
- vii. licensing the content including photographs, music or other businesses or individuals for use in the user's own projects; or
- viii. crowdfunding for raising funds for specific goals for a content creator or another person;

The tax will be at the rate of 15% of the amount paid or payable and the tax will be remitted to the Commissioner within 24 hours after deduction.

The above proposal demonstrates the government's intent to expand the tax base while taking cognizance of new business models.

Proposed effective date: 01 July 2023

Appointment of property agents as WHT agents on rent

The Bill proposes to provide that a person who collects rental income on behalf of the owner of the premises will be required to deduct and remit WHT to the Commissioner within 24 hours after the deduction. Only persons appointed as WHT agents for rental income by the Commissioner will be eligible to deduct the WHT.

The proposal is aligned with the Government's focus to bring into the tax net landlords who collect rent and do not pay Income Tax on the rental income. There will, however, be ambiguity on the implementation where both the tenant and the property agent are appointed as WHT agents for rental income and the property owner may end up in a perpetual income tax credit position. Further the Bill does not provide if the WHT on rental income will also be applicable on persons under the Monthly Rental Income Tax obligation which is a final tax.

Proposed effective date: 01 July 2023

Conditions for Income Tax Exemptions to certain entities

The ITA provides that the income of an institution, body of persons or irrevocable trust of a public character established solely for the purpose of relief of poverty, or distress of the public or the advancement of religion or education shall be exempt from Income Tax. Further, the institution, body of persons or irrevocable trust should be established in Kenya and have its regional headquarters in Kenya.

The Bill further proposes that an institution, body of persons or irrevocable trust of a public character established solely for the purpose of relief of poverty, or distress of the public or the advancement of religion will be qualify for Income Tax Exemption where:

- i. The entity is established to benefit the public in a transparent and accountable manner without restriction or discrimination of the level of charges or fees levied; and
- ii. The entity utilises its assets or income exclusively to carry out the purpose for which the entity was established without conferring a private benefit to an individual.

This proposal seeks to avoid tax exemption to organizations that restrict or discriminate on the services provided or those which are established to confer a private benefit to an individual.

Proposed effective date: 01 July 2023

Scrap of tax exemptions advanced to certain industries

The Bill proposes to scarp the tax exemption status granted to companies that are engaged in the manufacture of human vaccines. Subsequently, the Bill proposes that these entities shall pay Income Tax at a rate of 10%.

Proposed effective date: 01 July 2023

Exemption from Income Tax on certain payments

Further, the Bill proposes to exempt from Income Tax the following payments:

- a. Royalties paid to a non-resident person by a company undertaking the manufacture of human vaccines;
- b. Interest paid to a resident person or non-resident person by a company undertaking the manufacture of human vaccines;
- c. Investment income from a post-retirement medical fund, whether or not the fund is part of a retirement benefits scheme; and
- d. Payment in the form of funds transfer from a post-retirement medical fund to a medical insurance cover provider.

The proposal is meant to promote investments in the manufacture of human vaccines following the recent COVID-19 pandemic and help cushion against future pandemics. The proposal also seeks to encourage residents to contribute to the post-retirement medical fund where the transfer of funds and investment income will be exempted from Income Tax.

Proposed effective date: 01 July 2023

Amendments to the Second Schedule to the ITA

The Bill proposes make the following changes in related to capital allowances:

- i. Re-introduce Industrial Building allowance at the rate of 10% (the Bill is silent on whether the rate will be on a straight line or reducing balance). An industrial building will include a building used for the purpose of transport, bridge, tunnel, inland navigation, water and electricity or hydraulic power undertaking.
- ii. Introduce a capital allowance at the rate of 10% in equal installments for Docks. The Bill has defined Docks to include container terminal berth, harbour, wharf, pier, jetty, storage yard, or other works in or at which vessels load or unload merchandise but excluding a pier or jetty used for recreation.
- iii. Include under the ambit of civil works any earthworks for telecommunication equipment and construction works undertaken in connection with the installation and maintenance of telecommunication equipment and related structures.
- iv. Define telecommunications equipment to include civil works deemed as part of the telecommunication equipment or civil works that contribute to the use of the telecommunication equipment; and
- v. Define machinery used for agriculture to mean machinery used directly in agricultural activities including tilling, planting, irrigation, weeding and harvesting.

Further, the Bill proposes to clarify that the qualifying Investment Deduction of 100% will only be applicable to hotel buildings, buildings used for manufacture and machinery used for manufacture. However, the Bill proposes that the qualifying Investment Deduction of 100% will not apply to investments which due the nature of their business have to be located in outside Nairobi and Mombasa counties.

Proposed effective date: 01 January 2024

Introduction of a Super Tax Band

The Bill proposes to introduce a super tax band at the rate of 35% targeting high income earners whose income exceeds KShs 6,000,000 per annum. This will result in the government collecting more taxes from high income earners.

Proposed effective date: 01 July 2023

Clarity on local assemblers of motor vehicles

The Finance Act, 2017 introduced a preferential income tax rate of 15% for companies undertaking local assembly of motor vehicles provided that the company achieves a local content equivalent of 50% of the ex-factory value of the motor vehicles. There has, however been ambiguity on what constitutes local content in the absence of an express definition.

The Bill seeks to provide clarity on the ambiguity by providing that the local content will mean parts designed and manufactured in Kenya by an original equipment manufacturer operating in Kenya.

Proposed effective date: 01 July 2023

Increase in the advance tax rates

The Bill proposes to increase advance tax rates as follows:

Item	Current rate	Proposed new rate
Vans, pick-ups, trucks, prime movers, trailers and lorries	Higher of KShs 1,500 per tonne or KShs 2,400 per annum	Higher of KShs 3,000 per tonne or KShs 5,000 per annum
Saloons, station wagons, mini buses, buses and coaches	Higher of KShs 60 per passenger per month or KShs 2,400 per annum	Higher of KShs 100 per passenger per month or KShs 5,000 per annum

Proposed effective date: 01 January 2024

Increased scope of transactions subject to Capital Gains Tax

The Bill proposes to widen the scope of transactions that are subject to Capital Gains Tax (CGT) to include:

- the whole of the gains which accrued to a company, an individual or partnership on or after the transfer of property situated in Kenya, whether or not the property was acquired before 1st January, 2015, or
- gains derived from the alienation of shares or comparable interests, including interests in a partnership or trust, if, at any time during the 365 days preceding the alienation, the shares or comparable interests derived more than 20% of their value directly or indirectly from immovable property situated in Kenya, or
- gains, other than those to which (a) above applies, derived from the alienation of shares of a company resident in Kenya if the alienator, at any time during the 365 days preceding such alienation, held directly or indirectly at least 20% of the capital of that company.

However, persons alienating the shares will be required to notify the Commissioner in writing where there is a change of at least 20% in the underlying ownership of the property.

The above proposal aims at bringing under the scope of CGT additional transactions that result in the transfer of property situated in Kenya.

Proposed effective date: 01 July 2023

Measures to avoid misuse of CGT exemptions

The Bill has sought to limit the misuse of CGT exemptions by providing that:

- Where a property is transferred in a transaction that is not subject to CGT and the property is subsequently transferred in a taxable transaction within a period of less than five years, then the adjusted cost in the subsequent transfer will be based on the original adjusted cost as determined in the first transfer; and
- Exemption from CGT will only be applicable in respect of an internal restructuring which does not involve transfer of the property to a third party within a group which has existed for at least 24 months.

The above proposals are aimed at ensuring that taxpayers do not take undue advantage of CGT exemptions to avoid paying CGT.

Proposed effective date: 01 July 2023

Clarity on the due date for payment of CGT

The Bill proposes to clarify that the due date for payment of CGT will be the earlier of receipt of the full purchase price by the vendor or registration of the transfer. This proposal if adopted, will provide a strict timeline on the tax point for CGT on transactions to be when the seller has received the full price or a transfer has been registered unlike the current scenario where CGT is due on or before the date of application of transfer of the property.

Proposed effective date: 01 July 2023

Amendments to the Ninth Schedule to the ITA

The Bill proposes to amend the Ninth Schedule to the ITA to provide that a licensee or contractor will immediately notify the Commissioner in writing in the event there is a 20% or more change in the underlying ownership of a licensee or a contractor.

The above proposal is meant to align with Section 2 of the ITA which provides that control entails the direct or indirect ownership of at least 20% of the voting rights of an entity.

Proposed effective date: 01 July 2023

The Bill proposes introduction of several new definitions into the Income Tax Act (“ITA”)

‘Winnings’ – The Bill proposes to define winnings as payout from a betting, gaming, lottery, prize competition, gambling or similar transaction under the Betting, Lotteries and Gaming Act without deducting the amount staked or wagered. The current definition in the ITA is quite narrow and has been subject to many disputes between taxpayers in the betting and lottery industry.

This proposal tries to provide a recourse on the disputes by providing an all-inclusive definition of winnings. This proposal is however punitive as it excludes the amount staked or wagered in the definition of winning. In a recent Tax Appeals Tribunal Ruling which has been upheld by the High Court of Kenya, it was held that winnings constitute the net of the amounts staked by punters against the pay-outs to the punters. The underpinning philosophy to this ruling is that a taxpayer ought not be deprived a constitutionally guaranteed right to an economic entitlement provided under Article 43 of the Constitution. Similarly, the Income Tax Act at Section 3 provides that income tax is applicable on gains/profits as opposed to gross income. It appears that the proposal in the Bill is a knee-jack reaction to defeat a course that has already been canvassed in the courts with an outcome that is constitutionally and legally sound.

Proposed effective date: 01 July 2023

‘Immovable property’ - The Bill proposes to define immovable property to include land, covered by water or not, any estate, rights, interest or easement in or over any land and things attached to the earth or permanently fastened to anything attached to the earth, and includes a debt secured by mortgage or charge on immovable property and also includes a mining right, an interest in a petroleum agreement, mining information or petroleum information.

Currently there is no definition of immovable property in the ITA.

Proposed effective date: 01 July 2023

‘Person’ – The Bill proposes to define a person to include in the case of an individual, a reference to a relative where a relative includes the person’s spouse, any person related to the person through consanguinity or a spouse of the person related through consanguinity. The definition of a person is also to include a company for unnatural person. Currently there is no definition of a person in the ITA.

‘Related person’ – The Bill proposes to define a related person to mean, in the case of two persons where a person who participates directly or indirectly in the management, control or capital of the business of another person. Currently, there is no definition of a related person. However, the ITA defines a related party for transfer pricing purpose.

The proposals in relation to person and related persons are aimed at providing clarity on the definition of a person especially when in relation to individuals.

Proposed effective date: 01 July 2023

TAX APPEALS TRIBUNAL ACT

Proposal to have taxpayers settle 20% of the disputed tax prior an Appeal to the High Court

The Bill proposes to amend the Tax Appeals Tribunal Act (TAT Act) to compel a taxpayer to deposit 20% of disputed taxes or a security of a similar value with the Commissioner before lodging an Appeal to the High Court. Where the High Court rules in favour of the appellant, the Commissioner will be required to credit that amount or security to the taxpayer within 30 days after determination of the Appeal. However, no definition on what constitutes “credit” by the Commissioner is provided and therefore, could be subject to abuse by the Commissioner e.g. through offsetting against other current or future tax liabilities.

In the Finance Bill, 2022 the Government had proposed to introduce a deposit of 50% of tax in dispute, and earlier in 2014 through the Tax Procedures Bill, 2014 it had proposed to introduce 30% of tax in dispute before taxpayers can appeal decisions. In both instances, these proposals were dropped in the respective Acts. Whilst we try to rationalize the motive behind this attempted re-introduction, we maintain our opinion that this is un-constitutional and violates Article 48 of the Constitution of Kenya 2010 which provides “the State shall ensure access to justice for all persons and, if any fee is required, it shall be reasonable and shall not impede access to justice”.

This proposal does not enhance the protection of the right of access to justice, and amounts to a flagrant defiance to the letter and spirit of Article 48 of the Constitution. Article 48 affirms the natural meaning of “reasonable” to mean “that it is fair, proper or moderate in the circumstances” whilst “unreasonable” would mean that “It is so outrageous in its defiance of logic or accepted standards that no sensible person would apply his mind to the question to be decided would arrive at such logic”. This proposal further violates the oxygen principle which is the overriding objective of litigation which requires the Courts to facilitate the just, expeditious, proportionate and affordable resolution of all cases. Requiring a taxpayer to pay 20% of the disputed taxes inevitably defies this principle.

We hope that the National Assembly will do away with this proposal as it has done in the past to protect the rights of every taxpayer and avert impeding access to justice, which is a constitutional right for every Kenyan.

Proposed effective date: 01 July 2023

Documentation requirements for Appeals at the TAT

A taxpayer lodging an appeal with the TAT is currently required to submit a memorandum of appeal (MOA), statement of facts (SOF) and the tax decision within 14 days of filing the notice of appeal (NOA). The Bill proposes to replace “tax decision” with “appealable decision” and has gone ahead to introduce a clause allowing the taxpayer to submit such other documents as may be necessary to enable the Tribunal to make a decision.

This is a welcome move as it provides clarity on the appeals process and aligns the TAT Act to the TPA on an appealable decision. In addition, the introduction of a clause allowing the taxpayer to submit supporting documentation is welcome. It is however important to note that as per the TPA, a taxpayer is not allowed to introduce additional grounds in the appeal.

Proposed effective date: 01 July 2023



TAX PROCEDURES ACT

Alignment of refund decisions

The Bill proposes to amend the definition of a tax decision to exclude a refund decision. This proposal is meant to align the resolution of unfavourable refund decisions to the provisions relating to offset or refund of overpaid tax. Taxpayers will now appeal to the TAT in case of an unfavourable refund decision.

Currently, a refund decision is considered as a tax decision and where the refund decision is not in favour of the taxpayer, they may object to the refund decision before appealing to the TAT. At the same time, Section 47(13) of the TPA also provides an avenue for a taxpayer to appeal to the TAT within 30 days of notification of the refund decision.

The above proposal provides clarity on the process to be followed for appeals relating to refund decisions.

Proposed effective date: 01 July 2023

Record-keeping requirement by trustee

The Bill proposes to mandate all resident or non-resident trustees to maintain and avail records required by the Commissioner irrespective of whether the income generated is subject to tax in Kenya or not.

The above proposal is aimed at enhancing the current trustee documentation requirements where all trusts, whether in operation or not to notify the Commissioner within 30 days of any changes pertaining the full identity of the trust, including the address details of the trustees, the KRA Personal Identification Number (PIN) and beneficiaries of the trust.

Proposed effective date: 01 July 2023

Electronic Tax Invoice Management System

The Bill proposes to empower the Commissioner to introduce an E-TIMS system through which electronic tax invoices will be issued and records of stocks will be monitored real-time for purposes of accounting for taxes thereon.

Issuance of electronic tax invoices will exclude transactions of emoluments, imports, investment allowances, interest, and similar payments. The Commissioner may exempt a person from using E-TIMS. It is worth noting that E-TIMS implementation is currently under pilot phase.

Proposed effective date: 01 July 2023

Powers on the Commissioner to further amend assessments

The Bill proposes to empower the Commissioner to amend previously amended assessments within a further period of five years. This proposal goes against the statutory period of five years within which a taxpayer is required to maintain records.

This proposal may give the Commissioner the advantage of unfair administration of tax laws and give rise to endless tax disputes.

Proposed effective date: 01 July 2023

Cessation of tax abandonments on unpaid taxes

The Bill proposes to repeal the powers granted to the Commissioner/Cabinet Secretary to abandon recovery of taxes as a result of difficulty in recovery of unpaid tax from a taxpayer.

Proposed effective date: 01 July 2023

Waiver of penalties and interest to be scrapped

The Bill proposes to scrap grant of waivers of penalties and interest accrued on or after 1st January 2023. As noted below, taxpayers have an avenue to take up the amnesty on all penalties and interest accrued up to 31st December 2022. This was anticipated because in recent times the Commissioner has not been recommending for waivers of penalties and interest.

The intention of this proposal is to enhance tax compliance and collection by the Government.

Proposed effective date: 01 July 2023

Tax Amnesty

The Bill seeks to introduce a Tax Amnesty on all penalties, interest and fines on tax debt where a person had paid all the principal tax before 31st December 2022. However, if the principal tax due had not been paid before 31st December 2022 the taxpayer may apply to the Commissioner to take up the amnesty and propose a payment plan for the outstanding principal amount. The payment plan should not go beyond 30th June 2024.

Proposed effective date: 01 September 2023

Enforcement of the Commissioner's powers to issue agency notices

The Bill proposes to widen the Commissioner's powers to issue agency notices in either of the following circumstances:

- Where the taxpayer has not paid instalment taxes;
- Where the taxpayer has not objected to an assessment within the prescribed period;
- Where the taxpayer has not appealed to an assessment specified in an objection decision within the specified period;
- Where the taxpayer has not paid the taxes due before the due date after filing the self-assessment return; and
- Where the taxpayer has not appealed against an assessment specified in a decision of the TAT or Court.

Proposed effective date: 01 July 2023

VAT Withholding changes

The Bill proposes to reduce the timeline within which VAT Withholding should be remitted from the 20th of the following month to within three days after the deduction is made. The practicality of this proposal will be an outright challenge.

Additionally, the Bill proposes to remove VAT Withholding exemption on manufacturers whose value of investment in the preceding three years from 1st July 2022 is at least three billion shillings.

Proposed effective date: 01 July 2023

Timeline for payment of tax refunds

The Bill proposes to limit the time within which the Commissioner should pay tax refunds to 6 months from the date of ascertainment that the refund is payable. Where the commissioner fails to refund this amount within 6 months, the refund will be applied to offset any outstanding tax debts or future tax liabilities.

Proposed effective date: 01 July 2023

Timeline to provide additional documents to validate of Notice of Objection

The current provision allows a period of 14 days for the Commissioner to validate a taxpayer's notice of objection. The Bill proposes for taxpayers to provide additional documents to validate the notice within 7 days of being requested by the Commissioner. If the taxpayer does not provide the documents within the above timelines, the Commissioner shall proceed and issue an objection decision within 60 days from the date the notice of objection was lodged.

Proposed effective date: 01 July 2023

Extension of time for engagements under Alternative Dispute Resolution

The Bill proposes to extend the timeline to resolve matters out of Court or TAT from 90 days to 120 days.

Proposed effective date: 01 July 2023

Enhancement of Tax Shortfall Penalty

The Bill proposes to repeal the current tax shortfall penalty of 75% and replace it with a penalty equivalent to double the tax due. This would apply to taxpayers who knowingly evade payment of tax.

Proposed effective date: 01 July 2023

Introduction of Data Management and Reporting System

The Bill proposes to empower the Commissioner to establish a data management and reporting system, which will be used to submit electronic documents such as detailed transactional data in relation to those documents. Transactional data will include:

- the names and addresses of each person to whom a payment was made;
- where the payment is for services, the amount of the payment specifying whether the payment is a commission of any kind or is for expenses incurred in connection with rendering the services;
- where the payment is in any form of valuable consideration other than money, the particulars of the consideration; and
- such other particulars as the Commissioner may specify.

Upon the successful establishment of the system, the Commissioner will be required to notify the selected taxpayers in writing requiring them to submit the electronic documents through the system.

The Bill further clarifies that electronic documents will include electronic invoice returns relating to:

- Payments made by a taxpayer in the ordinary course of business where goods were exchanged for consideration by a person not employed in the business;
- Payments made by a person in the ordinary course of business where services were rendered, or in anticipation of services to be rendered, by a person not employed in the business;
- Payments for services rendered, or in anticipation of services to be rendered, in connection with the formation, acquisition, development, or disposal of a business or a part of it, by persons not employed in the business;
- Periodical or lump sum payments in respect of a royalty; or
- Such other commercial or financial transaction as may be designated by the Commissioner.

Proposed effective date: 01 September 2023

Penalty for non-compliance with Tax Electronic System

The Bill proposes to introduce a penalty in relation to non-compliance for the usage of tax electronic systems. The Commissioner will be required to issue the taxpayer with a notice requesting for valid reasons for gaps identified and if the commissioner is not satisfied with the taxpayer's response, the taxpayer will be liable to a penalty of one million or an amount equal to 10 times of the amounts due, whichever is higher.

This proposal is aimed at encouraging the use of the business information systems in the tax administration process.

Proposed effective date: 01 September 2023

Tax fraud offences

The Bill proposes to introduce imprisonment for a maximum term of 3 years where a person commits an offence of assuming the name or designation of the Commissioner or an officer appointed by the Commissioner and performs or procures the performance of the designated duties.

Proposed effective date: 01 July 2023

VALUE ADDED TAX CHANGES

VAT exemption on exportation of Taxable Services

The Bill proposes to exempt from VAT the exportation of taxable services which are currently subject to VAT at the rate of 16%. Additionally, the bill has proposed to exempt VAT on exportation of Business Process Outsourcing (BPO) which are presently zero rated from VAT.

The Finance Act, 2022 reclassified the VAT status on exported taxable services from VAT exempt to zero rated for Business Process Outsourcing (BPO) services and to standard rate of 16% on all other exported taxable services. The amendment into law in 2022 was a departure from the International VAT/GST Guidelines and the OECD's "destination principle" which recommend that VAT on cross-border transactions should be neutral. The amendment was also as a result of numerous disputes at both the TAT and the Courts on the VAT status of exported services.

The proposed VAT exemption on exportation of taxable services will not make the country competitive with other jurisdictions as the VAT exemption status limits taxpayers from claiming any input VAT incurred in relation to the exported services.

Proposed effective date: 01 July 2023

Abolishment of VAT on Transfer of business as a going concern

The Bill proposes to exempt from VAT the transfer of business as a going concern (TOGC). Whilst TOGC is currently chargeable to VAT at the standard rate of 16%, TOGC has undergone various reclassification in the recent past which brings uncertainties to taxpayers. It is noteworthy to mention that despite the aforesaid amendments, no express definition exists in the VAT Act to elaborate on what transfer of a business as a going concern actually entails.

Proposed effective date: 01 July 2023

VAT on Liquefied Petroleum Gas scrapped

The Bill proposes to exempt Liquefied Petroleum Gas ("LPG") from VAT. The supply of LPG is currently subject to VAT at the rate of 8%. This proposal is aimed at lowering the prices of LPG in a bid to lower the cost of living.

Notable also, the Bill has proposed to exempt Railway Development Levy (RDL) and Import Declaration Fee (IDF) levies on importation of LPG which is likely to further lower the prices of LPG.

Proposed effective date: 01 July 2023

Stringent measures prior to deductibility of input VAT

The Bill proposes to impose two mandatory conditions a taxpayer must meet before claiming input VAT. First, the taxpayer will be required to have in possession the appropriate transaction documentation stipulated by Section 17(3) of the VAT Act. Subsequently, the supplier should have declared the corresponding output VAT. This proposal is a departure from the current provision which requires taxpayers to meet either of the above conditions before claiming input VAT.

If enacted, this proposal will pass the burden of monitoring if suppliers have declared output VAT on to taxpayers, a role which currently is vested on the KRA and impose undue compliance burden on taxpayers in relation to claimability of input VAT.

Proposed effective date: 01 July 2023



Proposed reclassification of VAT status on Petroleum products

The Bill proposes to scrap VAT at the rate of 8% on petroleum products. The Bill seeks to amend Section 5 of the VAT Act, 2013 (the charging section) to eliminate the lower VAT rate of 8% on petroleum products which was introduced through the Finance Act, 2018.

However, per the proposed changes in the Bill, petroleum products are still listed under Paragraph 1, Section B of Part I of the First Schedule to the VAT Act and are subject to VAT at the rate of 8%. This is because the introductory paragraph on Section B of Part I to the First Schedule to the VAT Act still refers to the applicable VAT rate on petroleum products to be 8%. The lack of a clean-up in Section B of Part I of the First Schedule and the listing of petroleum products therein creates a quagmire on the VAT status of petroleum products. The proposed amendment is unclear as to whether the intention is to exempt petroleum products from VAT or subject them to VAT at the rate of 16%.

Proposed effective date: 01 July 2023

Output VAT to be accounted on insurance claims on taxable supplies

The Bill proposes to compel taxpayers to declare output VAT on any insurance compensations for loss of taxable supplies, in instances where the taxpayer originally claimed input VAT on the taxable supplies. Further, the Bill proposes that where the compensation includes VAT, the taxpayer must declare the compensation as a taxable supply and remit the corresponding output VAT to KRA. Where the compensation does not include VAT, the taxpayer will still be required to account for output VAT.

Proposed effective date: 01 July 2023

Mandatory VAT Registration for non-resident suppliers of digital services

The Bill proposes to impose a statutory VAT registration obligation on non-resident suppliers of digital services regardless of the threshold of their annual turnover. Currently, the VAT Act does not impose an obligation to non-resident suppliers of digital services to register for VAT where their taxable supplies fall short of annual turnover of KShs 5 million. This proposal seeks to enable KRA to enforce the Simplified Tax Registration Framework as stipulated under Regulation 7 of the Value Added Tax (Electronic, Internet and Digital Marketplace Supply) Regulations, 2023.

Proposed effective date: 01 July 2023

Proposal to abolish VAT on taxable supplies under the following Tariff classifications:

Item	Tariff No.	Current VAT status	Proposed change in the Bill
Other medicaments, containing alkaloids or derivatives thereof, put up in measured doses or in forms or packings for retail sale.	3003.41.00,3003.42.00, 3003.43.00, and 3003.49.00	Vatable at 16%	VAT exempt
Infusion solutions for ingestion other than by mouth not put up in measured doses or in forms or packings for retail sale and other medicaments consisting of two or more constituents which have been mixed together for therapeutic or prophylactic uses, not put up in measured doses or in forms or packings for retail sale.	3003.90.00	Vatable at 16%	VAT exempt
White absorbent cotton wadding, impregnated or coated with pharmaceutical substances, or put up in forms or packings for retail sale for medical, surgical, dental or veterinary purposes	3005.90.11,3005.90.12, 3005.90.19	Vatable at 16%	VAT exempt

Proposed effective date: 01 July 2023

Proposal to impose VAT on exempt supplies under the following Tariff classifications:

Item	Tariff classification	Current VAT status	Proposed change in the Bill
Milk, specially prepared for infants.	0402.29.10	VAT exempt	Vatable at 16%
Other - Antisera, other blood fractions and immunological products, whether or not modified or obtained by means of biotechnological processes.	3002.19.00	VAT exempt	Vatable at 16%
Other medicaments (excluding goods of heading No. 30.02, 30.05 or 30.06) consisting of two or more constituents which have been mixed together for therapeutic or prophylactic uses, not put up in measured doses or in forms or packings for retail sale	3003.90.90	VAT exempt	Vatable at 16%
White absorbent cotton wadding, impregnated or coated with pharmaceutical substances, ,or put up in forms or packings for retail sale for medical, surgical, dental or veterinary purposes	3005.90.10	VAT exempt	Vatable at 16%
Other medicaments (excluding goods of heading No. 30.02, 30.05 or 30.06) consisting of mixed or unmixed products, for therapeutic or prophylactic uses, put up in measured doses or in forms or packings for retail sale.	3004.90.90	VAT exempt	Vatable at 16%
Infusion solutions for ingestion other than by mouth not put up in measured doses or in forms or packings for retail sale.	3003.90.10	VAT exempt	Vatable at 16%
Other	3003.90.00	VAT exempt	Vatable at 16%

Proposed effective date: 01 July 2023

Proposal to reclassify VAT status of the following goods and services

Item	Current VAT status	Proposed change in the Bill
Taxable goods for direct and exclusive use for the construction of tourism facilities, recreational parks of fifty acres or more, convention and conference facilities upon recommendation by the Cabinet Secretary responsible for matters relating to recreational parks.	VAT exempt	Vatable at 16%
Bioethanol vapour (BEV) Stoves classified under HS Code 7321.11.00 (cooking appliances and plate warmers for liquid fuel)	VAT exempt	Vatable at 16%
Plant, machinery and equipment used in the construction of a plastics recycling plan.	VAT exempt	Vatable at 16%
Fetal Doppler-Pocket (Wgd-002) Pc and pulse oximeter-finger held (Gima brand) Pc of tariff number 9018.19.00 upon approval by the Cabinet Secretary responsible for matters relating to health	VAT exempt	Vatable at 16%
Such capital goods the exemption of which the Cabinet Secretary may determine to promote investment in the manufacturing sector: Provided that the value of such investment is not less than two billion shillings	VAT exempt	Vatable at 16%
Transportation of sugarcane from farms to milling factories	Zero rated	VAT exempt
Fertilizers of chapter 31.	Zero rated	VAT exempt

Item	Current VAT status	Proposed change in the Bill
Inputs or raw materials (either produced locally or imported) supplied to pharmaceutical manufacturers in Kenya for manufacturing medicaments, as approved by the Cabinet Secretary in consultation with the Cabinet Secretary responsible for matters relating to health.	Zero rated	VAT exempt
All inputs and raw materials, whether produced locally or imported, supplied to manufacturers of agricultural pest control products upon recommendation by the Cabinet Secretary responsible for matters relating to agriculture.	Zero rated	VAT exempt
Agricultural pest control products.	Zero rated	VAT exempt
Inputs or raw materials locally purchased or imported by manufacturers of fertilizer as approved by the Cabinet Secretary responsible for matters relating to agriculture.	Zero rated	VAT exempt
Taxable services for direct and exclusive use for the construction of tourism facilities, recreational parks of fifty acres or more, convention and conference facilities upon the recommendation by the Cabinet Secretary responsible for matters relating to recreational parks.	Zero rated	Vatable at 16%
Taxable services for direct and exclusive use for the construction of specialized hospitals with accommodation facilities upon recommendation by the Cabinet Secretary responsible for health, who shall issue guidelines for the criteria to determine the eligibility for the exemption.	Zero-rate	Vatable at 16% However, approval granted by the CS before effect of this and which was in force shall continue to apply until the supply of the exempted taxable services is made in full.

Proposed effective date: 01 July 2023

Proposal to clean-up applicable VAT exemptions

Proposed items to be exempt from VAT	Impact on the proposed change
Fish and crustaceans, molluscs and other aquatic invertebrates of Chapter 3 excluding those of tariff headings 0305, 0306 and 0307.	No significant change as the items are already exempt from VAT.
All goods and parts thereof of chapter 88.	VAT exemption currently applies only to aircraft parts of heading 8803 and excludes parts of heading 8801. As per the proposed amendment, VAT exemption will be applicable on all items of Chapter 88.
Taxable goods for the direct and exclusive use in the construction and equipping of specialized hospitals with a minimum bed capacity of one hundred, approved by the Cabinet Secretary upon recommendation by the Cabinet Secretary responsible for health who may issue guidelines for determining eligibility for the exemption.	The current exemption applies to specialized hospitals with a minimum bed capacity of fifty.
Printed and unprinted Perforated PE film of other plastics 15-22 gsm of tariff numbers 3921.90.10, and 3921.90.90.	VAT exemption currently only, applies to perforated PE film 15-22 gsm of tariff number 3921.90.00.

Proposed revision to the applicable VAT exemption	Change from current VAT exemption provision
Diagnostic kits or laboratory reagents and their certified reference materials of heading 3822 upon approval by the Cabinet Secretary responsible for matters relating to health.	VAT exemption currently applies to laboratory reagents whether or not on a backing, of headings heading 30.02 or 30.06.
Electro-diagnostic apparatus of various tariff numbers.	The provision is a clean up on Tariff numbers.
Other instruments and appliances, used in dental sciences of tariff 9018.49.00, Other ophthalmic instruments and appliances of tariff 9018.50.00 and other instruments and appliances of tariff number 9018.90.00 upon approval by the Cabinet Secretary responsible for matters relating to health.	VAT exemption is currently not applicable on other ophthalmic instruments of the various tariffs.
Artificial teeth of tariff number 9021.21.00, other dental fittings of tariff number 9021.29.00 and other artificial parts of the body of tariff numbers 9021.31.00 and 9021.39.00 and other appliances of tariff number 9021.90.00 upon approval by the Cabinet Secretary responsible for matters relating to health.	VAT exemption is currently not applicable on other artificial parts of the body of various tariff numbers and other appliances of various tariff number.
Discs, tapes, solid-state non-volatile storage devices, "smartcards" and other media for the recording of sound or of other phenomena, whether or not recorded of tariff heading 85.23, including matrices and masters for the production of discs, but excluding products of Chapter 37 upon approval by the Cabinet Secretary responsible for matters relating to health.	The change is a deletion of word "software", a clean up on Tariff numbers and a removal of misplaced words.
Weighing machinery (excluding balances of a sensitivity of 5 cg or better), of tariff number 8423.10.00 purchased or imported by registered hospitals upon approval by the Cabinet Secretary responsible for matters relating to health.	VAT exemption is currently on a wide range of weighing machines and is not applicable to the registered hospitals as proposed. Additionally, the proposal provides a clean-up on tariff numbers from 8423.31.00 to 8423.10.00.
Plant and machinery of chapter 84 and 85 imported or locally purchased by manufacturers of pharmaceutical products or investors in the manufacture of pharmaceutical products upon the recommendation of the Cabinet Secretary responsible for matters relating health.	VAT exemption is currently not applicable to locally purchased plants and machinery of Chapter 84 and 85 used in manufacture of pharmaceutical products.
All tea sold for the purpose of value addition before exportation subject to approval by the Commissioner of Customs.	Tea is currently subject to VAT at 16%

Proposed effective date: 01 July 2023

Further clean ups to the VAT legislation

Item	Proposal	VAT Implication
Tariff Numbers in the VAT Act aligned to the EAC HS Codes.	The Bill has proposed to change the HS Codes for various items that are currently exempt from VAT under the First Schedule to the VAT Act	There is no VAT implication since description of items exempt items in the current provisions have not been affected. Only the HS Numbers have been revised.
Place of Supply of services	The bill proposes that where a supplier of the service not in Kenya, the supply can be deemed to made in Kenya where the recipient of the services is either a registered person or a unregistered person.	This is a clean-up provision to enable ease of accounting for reverse VAT.
Record keeping of documents.	The bill proposes that relevant documents for VAT purposes must not be kept in Kenya.	This is another clean-up provision to factor for the dynamics of conducting business where documents are stored digitally and on "cloud based solutions" which are not Kenyan jurisdiction

EXCISE DUTY ACT

Repeal of Inflationary Adjustments by the Commissioner

The Bill proposes to repeal the power by the Commissioner to prescribe inflation adjustments on excise duty rates. Currently, the Commissioner, with the approval of the Cabinet Secretary, is empowered to adjust the specific excise duty rates once a year to adjust for inflation. Since the specific rates are set at a specific amount, the inflation adjustment enables the Government to collect additional taxes by adjusting for inflationary effects. Recently the Commissioner seemed to use the powers arbitrarily causing unplanned market distortions.

This is a welcome move for manufacturers of excisable goods as it gives them more certainty on the excise duty rates over a longer period of time and consequently, make longer-term decisions and stabilize prices in the market.

Proposed commencement date: 01 July 2023

Offences relating to Excise Stamps

The Bill has proposed to enhance offences and penalties specific to excise stamps as follows:

- where a person defaces or prints over an excise stamp affixed on any excisable goods or package;
- where a person is in possession of excisable goods on which excise stamps have not been affixed and which have not been exempted from the requirements of the Act;
- where a person prints, counterfeits, makes or in any way creates an excise stamp without the authority of the Commissioner;
- where a person is in possession of an excise stamp which has been printed, made or in any way acquired without the authority of the Commissioner;
- where a person is in possession of, conveys, distributes, sells, offers for sale or trades in excisable goods without affixing excise stamps in accordance with the Act; or
- where a person is in possession of, conveys, distributes, sells or trades in excisable goods which have been affixed with counterfeit excise stamps.

A person who commits such an offence will be liable to a fine not exceeding KShs 5 million or imprisonment for a term not exceeding 3 years, or both.

This move is aimed at curbing revenue leakages through unauthorized use of excise stamps whereas the fines are expected to discourage unscrupulous traders from contravening these provisions.

Proposed commencement date: 01 July 2023

Excise Duty Payments on Betting and Gaming

The Bill seeks to introduce a requirement for bookmakers to pay excise duty on betting and gaming offered through a platform or other medium within 24 hours from closure of transactions of the day. The Bill has clarified the closure of transactions to be midnight of the day.

This provision has been introduced as a result of a successful pilot program initiated by KRA in 2022 on a select number of betting firms in Kenya. Under this pilot program, the selected betting companies were required to remit excise duty on a daily basis, which resulted in a significant increase in excise duty collected from the Industry.

Proposed commencement date: 01 July 2023



Commissioner empowered to introduce 24 hour payment requirement

The Bill proposes to empower the Commissioner, by notice in the Kenya Gazette, to require taxpayers in any sector to remit excise duty collected on certain excisable services within 24 hours from the closure of transactions of the day.

Proposed commencement date: 01 July 2023

Enhancing licence Regulations

The Bill intends to bring clarity on the time granted to a licensed person whose excise licence has been suspended. Currently, persons served with a notice of suspension of license may appeal within 14 days of the service of the notice. Upon receipt of the notice of the appeal, the Commissioner may either accept the appeal, provide the licensed person with a written notice of the actions to be taken before a specified date in the notice to remedy the deficiencies leading to the suspension or reject the appeal.

The Bill proposes to introduce a timeline on the specified date on the Commissioner's written notice. Consequently, the Commissioner will be required to give the taxpayer notice of at least 14 days to remedy the deficiencies. This is a welcome move as it provides the licensed person at least 14 days to remedy the deficiency. In the absence of this provision, the Commissioner was empowered to prescribe any time, no matter how short.

Proposed commencement date: 01 July 2023

Digital Lenders

The Bill has proposed to replace the items subject to excise duty for digital lenders. Currently, excise duty is applicable on fees charged by digital lenders. However, the term "fees" has been replaced with "any amount charged in respect of lending".

The expanded definition brings clarity on the amounts subject to excise duty for digital lenders hence ending ambiguity on the base for calculation of excise duty payable.

Proposed commencement date: 01 July 2023

Changes to the Excise Duty rates

Tariff Description	Current Excise Duty Rate	Proposed Excise Duty Rate
Condensates per 1000l @ 20degC [Tariff 2709.00.10]	6,545.59	-
Imported White chocolate including chocolate in blocks, slabs or bars of tariff nos. 1806.31.00, 1806.32.00, and 1806.90.00	257.55 per kg	-
Imported white chocolate of heading 1704; chocolate and other food preparations containing cocoa of tariff nos. 1806.31.00, 1806.32.00 and 1806.90.00;	-	257.55 per kg
Articles of plastic of tariff heading 3923.30.00 and 3923.90.90	10%	-
Articles of imported plastic of tariff heading 3923.30.00 and 3923.90.90	10%	10%
Imported pasta of tariff 1902 whether cooked or not cooked or stuffed (with meat or other substances) or otherwise prepared, such as spaghetti, macaroni, noodles, lasagne, gnocchi, ravioli, cannelloni, couscous, whether or not prepared	20%	20%
Pasta of tariff 1902 whether cooked or not cooked or stuffed (with meat or other substances) or otherwise prepared, such as spaghetti, macaroni, noodles, lasagne, gnocchi, ravioli, cannelloni, couscous, whether or not prepared	-	20%
Imported sugar confectionary or tariff heading 17.04	42.91 per kg	42.91 per kg

Tariff Description	Current Excise Duty Rate	Proposed Excise Duty Rate
Sugar confectionary or tariff heading 17.04	-	42.91 per kg
Sugar excluding sugar imported or locally purchased by a registered pharmaceutical manufacturer	-	5 per kg
Imported Fish	-	100,000 per MT or 20%, whichever is higher
Powdered Juice	-	25 per kg
Human hair and other products of heading 6703	-	5%
Wigs, false beards, eyebrows and eyelashes, switches and the like, and other products of heading 6704	-	5%
Artificial nails of tariff no. 3926.90.90	-	5%
Imported cement	-	1.50 per kg or 20% whichever is higher
Imported furniture excluding furniture originating from East African Community Partner States that meet the East African Community Rules of Origin	-	30%
Imported cellular phones	10%	10%
Imported paints, varnishes and lacquers of heading 3208, 3209 and 3210	-	15%
Imported Test liner of heading 4805.24.00	-	25%
Imported fluting medium of heading 4805.19.00	-	25%
Telephone and internet data services	20%	15%
Money transfer services by banks, money transfer agencies and other financial services	20%	15%
Money transfer series by cellular phone, payment service providers licensed under the National payment System Act.	12%	15%
Excise duty of betting	7.5%	20%
Excise duty on gaming	7.5%	20%
Excise duty on price competition	7.5%	20%
Excise duty on lottery	7.5%	20%
All amounts in respect to lending	7.5%	20%
Advertisement on television, print media, billboards and radio stations on alcoholic beverages, betting, gaming, lotteries and prize competitions		15%

Proposed commencement date: 01 July 2023

MISCELLANEOUS FEES AND LEVIES ACT

Introduction of Export and Investment Promotion Levy

The Bill proposes to introduce a new levy, Export and Investment Promotion Levy (EIPL), to be levied on all goods imported into the country for home use. The purpose of EIPL is to provide funds to boost manufacturing, increase exports, create jobs, save on foreign exchange and promote investments. The EIPL will be established and managed in accordance with the Public Finance Management Act, 2012 and shall be paid by the importer of such goods at the time of entering the country.

Goods originating from East Africa Community (EAC) partner states that meet the EAC Rules of Origin are however exempt from EIPL. In the proposed amendment, EIPL will be applicable on specified goods e.g. cement clinkers, specific semi-finished products of iron or non-alloy steel, specific bars and rods of iron or non-alloy steel, specific kraft paper and paperboard and specific sacks and bags. The proposed EIPL rate is 10% of the customs value.

This proposal is aimed at protecting specific local industries with the intention to boost manufacturing and promote investments into Kenya.

Proposed effective date: 01 July 2023

Reduction in IDF and RDL Rates

The Bill proposes to reduce Import Declaration Fee (IDF) from 3.5% to 2.5% of the customs value. Similarly, Railway Development Levy (RDL) rate has been proposed to be reduced from 2% to 1.5%. The Bill has also proposed to scrap the preferential IDF and RDL rates of 1.5% applicable to raw materials and intermediate products imported by manufacturers and inputs for construction of houses under the affordable housing scheme. Further, the Bill has proposed to scrap the preferential rate of 1.5% for goods imported under the EAC Duty Remission Scheme.

This proposal is a double-edged sword as it increases IDF and RDL rates on imported raw materials for manufacturers and affordable housing developers who qualified for the preferential rates while at the same time, reducing the overall cost of imports for other importers.

Proposed effective date: 01 July 2023

IDF and RDL Exemptions

The Bill proposes to clarify that IDF and RDL exemptions will apply to goods for official use by diplomatic and consular missions, the United Nations and its agencies, and institutions or organizations exempted under the Privileges and Immunities Act. Currently, the exemptions apply to goods destined for official aid-funded projects.

The Bill also proposes to expand the scope of IDF and RDL granted to Kenya Defence Forces and the National police Service to include all goods including material supplies imported for official use. Currently, the exemptions only apply to equipment, machinery and motor vehicles for official use.

Additionally, the Bill proposes to exempt from IDF and RDL aircraft, spacecraft and parts thereof of Chapter 88, LPG and goods imported for official use by international and regional organisations that have bilateral or multilateral agreements with Kenya.

Proposed effective date: 01 July 2023



Export Levy Changes

The Bill proposes to introduce and amend export levy rates as follows:

Tariff Description	Current Export Levy Rate	Proposed Export Levy Rate
Whole unsplit hides and skins, of a weight per skin not exceeding 8 kg when simply dried, 10 kg. when dry salted, or 16 kg. when fresh, wet salted or otherwise preserved [Tariff 4101.20.00]	80% or USD 0.52 per kg.	50% or USD 0.32 whichever is higher
Raw skins of sheep or lambs (pickled, but not tanned, parchment-dressed or further prepared), without wool on whether or not split, other than those excluded by Note 1(c) to Chapter 41 [Tariff 4101.21.00]	80% or USD 0.52 per kg.	50% or USD 0.32 whichever is higher
Other raw skins of sheep or lamb (fresh, or salted, dried, limed, pickled or otherwise preserved, but not tanned, parchment-dressed or further prepared), without wool on, whether or not split, other than those excluded by Note (c) to Chapter 41 [Tariff 4101.29.00]	80% or USD 0.52 per kg.	50% or USD 0.32 whichever is higher
Other raw hides and skins (fresh, or salted, dried, limed, pickled or otherwise preserved, but not tanned, parchment dressed or further prepared), whether or not debarred or split, other than those excluded by Note 1 (b) or (c) to this Chapter, of reptiles. [Tariff 4103.20.00]	80% or USD 0.52 per kg.	50% or USD 0.32 whichever is higher
Other raw hides and skins (fresh, or salted, dried, limed, pickled or otherwise preserved, but not tanned, parchment dressed or further prepared), but not debarred or split, other than those excluded by Note 1 (b) or 1 (c) to this Chapter, of swine. [Tariff 4103.30.00]	80% or USD 0.52 per kg.	50% or USD 0.32 whichever is higher
Other raw hides and skins other than of reptiles, swine, goats or kids of [Tariff 4104.19.00]	80% or USD 0.52 per kg.	50% or USD 0.32 whichever is higher
Other tanned or crust hides and skins of bovine (including buffalo) or equine animals, without hair on, whether or not split, but not further prepared, in the wet state (including wet - blue) [Tariff 4104.19.00]	80% or USD 0.52 per kg.	50% or USD 0.32 whichever is higher
Hides and skins of equine animals. [Tariff 4101.40.00]	80% or USD 0.52 per kg.	-
Whole hides and skins, of weight exceeding 16 kg. [Tariff 4101.50.00]	80% or USD 0.52 per kg.	50% or USD 0.32 whichever is higher
Other, including butts, bends and bellies. [Tariff 4101.90.00]	80% or USD 0.52 per kg.	50% or USD 0.32 whichever is higher
Raw skins of sheep or lamb (fresh, or salted, dried, limed, pickled or otherwise preserved, but not tanned, parchment dressed or further prepared), with wool or, whether or not split, other than those excluded by Note 1(c) to Chapter 41. [Tariff 4102.10.00]	80% or USD 0.52 per kg.	50% or USD 0.32 whichever is higher
Raw furskins of mink, whole, with or without head, tail or paws. [Tariff 4301.10.00]	80% or USD 0.52 per kg.	50% or USD 0.32 whichever is higher
Other raw furskins, whole, with or without head, tail or paws. [Tariff 4301.80.00]	80% or USD 0.52 per kg.	50% or USD 0.32 whichever is higher
Heads, tail, paws and other pieces or cuttings, suitable for furriers' use. [Tariff 4301.90.00]	80% or USD 0.52 per kg.	50% or USD 0.32 whichever is higher
Whole skins, with or without head, tail or paws, not assembled, of mink. [Tariff 4302.11.00]	80% or USD 0.52 per kg.	50% or USD 0.32 whichever is higher

Tariff Description	Current Export Levy Rate	Proposed Export Levy Rate
Other whole skins, with or without head, tail or paws, not assembled. [Tariff 4302.19.00]	80% or USD 0.52 per kg.	50% or USD 0.32 whichever is higher
Heads, tails, paws and other pieces or cuttings, not assembled. [Tariff 4302.20.00]	80% or USD 0.52 per kg.	50% or USD 0.32 whichever is higher
Bismuth and articles thereof including waste and scrap. [Tariff 8105.00.00]	20%	-
Bismuth and articles thereof including waste and scrap containing more than 99.99% of bismuth, by weight [Tariff 8106.10.00]	-	20%
Other bismuth and articles thereof including waste and scrap [Tariff 8106.90.00]	-	20%
Waste and scrap of cadmium. [Tariff 8107.30.00]	20%	-
Waste and scrap of zirconium. [Tariff 8107.30.00]	20%	-
Waste and scrap of zirconium containing less than 1 part hafnium to 500 parts zirconium by weight [Tariff 8109.31.00]	-	20%
Cobalt mattes and other intermediate products of cobalt metallurgy; cobalt and articles thereof, including waste and scrap [Tariff 8105]	-	20%
Other waste and scrap [Tariff 8109.39.00]	-	20%
Molasses resulting from the extraction or refining of sugar	-	20%

The Bill also proposes to align various tariff numbers in the Excise Duty Act to the East African Community Common External Tariff (EACCET).

Proposed effective date: 01 July 2023

Introduction of National Housing Development Fund

The Bill proposes to amend the Employment Act to introduce a mandatory National Housing Development Fund (NHDF) contribution by the employer and employee. The employer and employee will each contribute 3% of the employee's monthly basic salary, subject to a limit of KShs 5,000 per month. NHDF will be due by the 9th day of the following month.

The NHDF is aimed at enabling employees to finance the purchase of a home under the affordable housing scheme. Employees who are not eligible for affordable housing may (upon expiry of 7 years from the date of starting contributions or upon attaining retirement age) either:

- transfer their contributions to a pension scheme or a retirement benefits scheme registered with the Retirement Benefits Authority (RBA);
- transfer to any other person eligible for affordable housing;
- transfer to their spouse or dependent children; or
- receive their contributions in cash. However, contributions paid out in cash will be subject to tax on the contributor.

Contributions to NHDF will be entitled to a return, based on the performance of the Fund. The Cabinet Secretary for Housing, in consultation with the Cabinet Secretary for Finance, are allowed to make regulations prescribing the qualifications to participate in the affordable housing scheme.

This is a welcome move as it enables taxpayers to save for affordable housing while at the same time, increasing funds available to channel to the affordable housing projects.

Proposed effective date: 01 July 2023

OTHER MISCELLANEOUS CHANGES

Kenya Roads Board Act

The Bill proposes to amend Section 35 (2A) to require the Kenya Roads Board to include annual road programmes when making submissions of annual estimates of revenue and expenditure, through the Cabinet Secretary for Roads. At present, it is not a requirement to include the annual road programmes as part of the submission. This provision is aimed at increasing transparency on the budgetary process before the same is approved.

Kenya Revenue Authority Act

The Bill proposes to amend the Act to enable the KRA to establish an institution to provide capacity building and training staff of the Authority, the general public as well as other jurisdictions. This change is aimed at increasing the skill set of KRA, creating awareness within stakeholders as well as building bridges with other Revenue Authorities outside Kenya.

Unclaimed Financial Assets Act

The Bill proposes to amend Section 28 of the Act to allow the Unclaimed Financial Assets Authority (UFAA) to pay or deliver the amount received or the net proceeds in the event of a sale of assets, as the claimant may designate. This allows the designated claimant to also receive amounts after a successful claim.

Statutory Instruments Act

The Bill proposes various changes to Section 20 and 21 of the Act which will delete the mandatory provisions relating to automatic revocation of statutory instruments after expiry of 10 years and the review of statutory instruments by regulatory bodies.

The Retirement Benefits (Deputy President and Designated State Officers) Act

The Bill proposes to delete the circumstances under which entitled persons may not get benefits as listed in the Act. There is also a proposal to avoid duplication of benefits for persons due to their current and past positions in Government. A further proposal has been made to provide pension benefits to an entitled person under the Parliamentary Pensions Act. Other proposals include additional benefits for the retired Speaker of the National Assembly or the Senate as well as for The Clerk of the National Assembly as well as the Clerk of the Senate.



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right size
right solutions

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